

Family and the Law

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The Family Law System

The Constitution sets out specific powers which the Commonwealth Government has. This includes at s51 of the Constitution:

- (xxi) Marriage;
- (xxii) Divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants

Powers not specifically listed are left to the states. The States can refer their powers to the Commonwealth.

The Constitution has affected the development of family law. It necessarily has been a piecemeal process as there is no general family law power.

The Commonwealth Government did not set up the Family Court until 1975. Up until then it was up to state courts to determine family law matters. It was also based on fault so issues such as adultery were relevant. The *Family Law Act 1975 (Cth)* which commenced in 1976 represents a major reform. It introduced:

- A specialist court, being the Family Court of Australia to deal with family disputes
- The court emphasised alternative dispute resolution
- No fault divorce - the only ground for a divorce is that the marriage has broken down irretrievably

States referred powers in relation to children of unmarried parents but not child welfare or adoption between 1986 and 1990.

The Federal Magistrates Court was created by the *Federal Magistrates Act 1999 (Cth)*. The Federal Magistrates Court was designed to be quicker, cheaper and less formal than the Family Court. The Federal Magistrates Court has jurisdiction in other federal areas of law as well as family law.

The Children's Cases Program was introduced in 2004. This laid down the foundation for the Less Adversarial Trial (LAT) for children's matters. This represents a significant modification to the traditional adversarial system. In many aspects it is closer to an inquisitorial system than the adversarial system. The trial judge is much more interventionist. The trial judge is involved in the case management of the trial very early on and controls the number of witnesses called and the issues that the parties are to address. The parties speak to the judge directly early on.

In August 2008 a report by Dennis Semple and the Attorney-General's Department recommended that the Federal Magistrate's Court be

abolished: see *Future Governance Options for Federal Family Law Courts: Striking The Right Balance*.

Most states later referred powers with respect to financial aspects of de facto relationships after separation.

What is family?

Is this a family? Circa 1939



What about this family? Circa 1968



What about these families?



The concept of family has changed over time

- Recent reforms
 - *Miscellaneous acts Amendment (Same Sex Relationships) Bill 2008* (assented to on 11 June 2008.)
 - Amended *Status of Children Act (NSW) s14* so that when a woman undergoes fertilisation procedure and she is in a relationship with another woman, the other woman is presumed to be the parent of any child born as a result of that pregnancy (but only if the other woman consented to the procedure).
 - This amendment is retrospective

- Amended the *Births, Death and Marriages Registration Act* (NSW) enabling same sex couples to apply to amend the birth certificate where the presumption applies (see above) so that both women are named on the birth certificate as parents
- In 2008 several other pieces of legislation were amended to remove discrimination against same sex couples in a variety of areas
- In recent years there has also been increased debate about same sex marriage and civil unions. ACT's attempt to introduce civil union legislation thwarted by the then Federal government. Current government says it is not on its agenda.
- These reforms need to be seen in the context of years of lobbying
- HEROC Report *Same Sex Entitlements*
 - Published in 2007
 - Highlighted many areas of discrimination
 - Made the important point that the non-recognition of one child's parent is a human rights issue for the child.
Whatever people think about same sex families, these families have existed for years and will continue to do so whether or not they are given legal recognition

De Facto Property Law Reform

Family Law Amendment (De Facto Financial Matters and Other Measures) Act (CTH)(2008)

- The major purpose of the Act was to amend the Family Law Act to include financial provisions for de facto couples.
- Provisions affecting same sex parents commenced on 21 November 2008.
 - Section 60H of the Family Law Act which deals with children born as a result of artificial conception:
 - Amended retrospectively so in certain circumstances when a child is born to a lesbian couple the non-biological mother is deemed a parent;
 - S60H refers to surrogacy arrangements.
- Provisions introducing financial matters for de factos commenced on 1 March 2009.

De facto couples (including same sex) who separate after 1 March 2009 can access the Family Court and will have the same rights as married couples (provided threshold and jurisdictional issues are satisfied) with respect to:

- Property adjustment
- S75(2) factors – future needs - disparity of income and

- financial resources
 - Access to superannuation splitting
 - Access to third party and bankruptcy provisions
 - Access to a specialist court
 - Access to maintenance
 - The ability to have parenting and property matters dealt with by the same court
- There was also public debate surrounding the de facto law reforms with respect to property adjustment
 - Some queried will this threaten the institution of marriage?
 - Perhaps de factos don't want the same legal rights as married couples?
 - The trouble with this is that it assumes that people are aware of their legal rights and aware of the differences. In my experience, in 13 years of practice this is not the case for most people

Shared Parenting

Family Law Amendment (Shared Parental Responsibility) Act 2006 represented major reforms to the Family Law Act with respect to parenting.

- The then Federal Attorney General stated that
 - *"These are the most significant reforms to the Family Law system in 30 years. The initiatives represent a generation of change in Family Law and aim to bring about a cultural shift in how family separation is managed - away from litigation and towards cooperative parenting solution. The government wants to change the way people think about family breakdowns, and to improve outcomes for children. The government is reforming system to promote shared or cooperative parenting"*
 - The 2006 reforms changed the substantive law and legal process but the key issue is the disjunction between the ideal of shared parenting and actual parenting behaviour. See Belinda Fehlberg and Juliet Behrens *Australian Family Law: The Contemporary Context* Oxford University Press, Melbourne, 2008 page 226

Parenting – a little history

- Family Law Act introduced in 1976
- Concepts of guardianship, custody and access
- Guardianship (decision-making) and custody generally granted to one parent (usually the mother) and access to the other parent
- Think about community standards and expectations of the time:
 - Much less common for women to continue in paid employment after having children
 - No concept of parental leave
 - Men were expected to be the breadwinners
 - Would be against the norm for fathers to be actively involved in raising their children
- 1995 Family Law Reform Act
 - Guardianship, custody and access are out
 - Joint parental responsibility, residence and contact are in
 - The aim was to get away from there being a 'winner' and a 'loser'
 - Parental responsibility- an important concept focusing on decision-making re major issues, e.g. a child's education, health, religion
 - It is separated from the concept of the time the child spends with each child
 - S65E – best interests of the child paramount
 - S68F – determining best interests of child - 12 factors listed

2006 Reforms

- Presumption equal shared parental responsibility unless:
 - Abuse or violence
 - Not in child's best interests
- If presumption applies court must *consider*:
 - If equal time
 - or substantial and significant time defined to include time during the week and weekend timeis in child's best interests
- then consider if it is reasonably practical
- best interests of child still paramount
- s60CC determine best interests child by reference to primary and additional factors

- The 2006 reforms cannot easily be separated from the political climate of the time.
- The most vocal lobby groups were father's rights groups pushing for equal time
- Parliamentary committee rejected introducing a presumption for equal time. See Standing Committee on Family and Community Affairs *Every Picture Tells A Story: Inquiry into Child Custody Arrangements in the Event of Family Separation*, December 2003.
- Parliamentary committee reported a strong community belief that the court imposed an 80:20 rule (meaning that one parent would have care of the child for 80% of the time and the other only 20% (every second weekend and half school holidays))
- Significantly this belief wasn't challenged
- How would that have fitted in with the principle that in parenting matters the best interests of the child is the paramount consideration?
- Shared and cooperative parenting sounds ideal and that's the problem it's an idealised view of family

Bruce Smyth 'Time To Rethink Time? The experience of time with children after Divorce' *Family Matters* no.71 winter 2005

- Subjective experience of time
- Non-residential fathers experience their time with their children as stilted, shallow and brief
- Resident mothers experience as fluid and demanding
- Pre-occupation with mathematics rather than the emotional experience of time - intermingling different activities and experiences
- Smyth highlights the importance of 'being time'. What matters is how the time is spent not just how it is allocated

Jennifer McIntosh and Richard Chisholm "Shared Care and Children's Best Interests in Conflicted Separation" A Cautionary Tale from Current Research" *Australian Family Lawyer* Vol20 No 1 page 1

- Children benefit from good quality relationships with both parents
- Focus here isn't on parents who can put their children's interests first but on children where there is persisting conflict
- Shared care works where:
 - Parents live close to each other
 - Parents get on well with each other
 - Parents are able to make child focused arrangements which keep children out of the middle
 - There is a commitment to make it work
 - Both parents have flexible family friendly work arrangements
 - Both parents are comfortably financially

- Parents have a shared confidence that the father is a competent parent
- Shared care is not appropriate where there is a high level of
 - conflict
 - Parental attunement is compromised
 - In order to maintain relationships with both parents children have to develop conditional high maintenance loyalties
 - It is not just children being exposed to actual conflict but ongoing denigration one parent by the other embroiling the children
 - Children in high conflict families more likely to clinical anxiety and other problems

For example of a case where the court held it was not the children's best interests for the equal shared parental responsibility not because of violence or abuse but because of the high level of parental conflict

see Hand H [2007] FamCA 27

<http://www.austlii.edu.au/au/cases/cth/FMCAfam/2007/27.html>

What should we make of all of this?

It comes back to this:

- The 2006 reforms changed the substantive law and legal process but the key issue is the disjunction between the ideal of shared parenting and actual parenting behaviour.

See Belinda Fehlberg and Juliet Behrens *Australian Family Law: The Contemporary Context* Oxford University Press, Melbourne, 2008 page 226

Remember that the cases the courts have to determine are the ones that involve the most intractable cases. Most cases settle without reaching a final hearing.

Do the 2006 laws go too far?

The 2006 are largely misunderstood in the community. Many people think there is a presumption about time not parental responsibility

Do fathers really want equal time or do they want more involvement?

Recently the Australian Institute of Family Studies has released an evaluation report of the 2006 reforms and has reported mixed results. On the positive side less parenting matters are being filed in court. However shared care is a real concern is shared care arrangements in families where there is high conflict and violence. The report also confirmed that many parents misunderstand the nature of the parenting reforms.

<http://www.aifs.gov.au/institute/media/media100128.html>

Child Support Reforms

The child support scheme was introduced in 1988. It was in response to many criticisms of the court system of dealing with child maintenance.

Applying to a court for maintenance was expensive, the decisions were discretionary so there was little predictability and there was a low compliance rate with court orders. The amount of maintenance ordered tended to be low.

The Child Support Scheme is largely administrative.

Two pieces of legislation govern the child support scheme: the *Child Support (Assessment) Act 1989 (Cth)* and the *Child Support (Registration and Collection) Act 1988 (Cth)*.

The *Child Support (Registration and Collection) Act* (which was then known as the *Child Support Act*) was introduced first and was known as stage 1 of the child support scheme. Section 3 sets out the objects of the Act which are:

- children receive from their parents the financial support that parents are liable to provide
- that periodic maintenance payments are made on a regular and timely basis
- that Australia is in a position to give effect to its obligations under international agreements

A key part of the administrative scheme is the child support formula. The formula calculated the child support a liable parent has to pay based on parents incomes, number of children and percentage of care.

The changes will include:

- adjustments to the formula to base payments on the actual costs of children
- the incomes of both parents will be treated the same and the combined income of both parents will be used to calculate child support payments.
- Contributions to costs of children through care and contact will be recognized
- Children of first and second families will be treated more equally
- Recognize that teenagers cost more than children aged 12 and under
- Reducing the payments of high income earners
- Simplifying the change of assessment process
- Introducing an independent review of child support agency's decisions through the Social Security Appeals Tribunal
- Great enforcement of child support payments

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Family Violence

The attitude of the law and the community in relation to family violence has changed over the years. It used to be seen as something private and somehow less serious.

In the case of *Heidt* [1976] Murray J said there was no suggestion that husband ever treated his children with the violence he treated his wife. When assessing his competency as parent the court ignored his behaviour as a husband. This case would not be decided in the same way today. There is recognition that violence in the home negatively impacts on children even if they are not subjected to directly or witness it.

In the Marriage of JG and BG [1995] FLC92-515 violence is relevant in parenting proceedings as it assists court determine best interests. Family violence may be relevant to child's welfare in a variety of ways even when not directed at or witnesses by child. As far as the evidence allows court attempt to understand nature of violence and effect on child.

Section 4 of Family Law Act:

"family violence" means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

Violence is not limited to physical violence. It can also be emotional, psychological, social, sexual, and financial. It is about power and control.

Criminal Law - new Act - Crimes (*Domestic and Personal Violence*) Act 2007 (NSW) (10.03.08)

- crimes like assault etc
 - applies in all relationships
 - criminal standard of proof (beyond reasonable doubt) applies
- apprehended domestic violence orders
 - civil standard of proof applies to the granting of ADVO – person seeking ADVO has (genuine) fear for his or her safety
 - the criminal standard of proof (beyond reasonable doubt) applies to breach of ADVO.

Civil Law - *Family Law Act* 1975 (Cth)

- Injunctions between married or de facto partners or in relation to children/carers
- Civil standard of proof (balance of probabilities) applies to breaches of an injunction (including a personal protection or restraining order) - Also note s 114AA: State police may 'arrest' a party breaching a personal protection or restraining order and bring them to court to answer a contempt of court

Recently there have been multiple studies released on family violence:

- Chisholm Report- Family Courts Violence Review December 2009
 - More than half of parenting cases contain allegations of violence
 - The so called friendly parent provision needs to be amended to reflect the fact that sometimes parents need to take action to protect children. Some parents are afraid to disclose violence because of it.
 - Theme: violence needs to be disclosed, understood and acted upon
- Family Law Council report
 - Also recommends friendly parent provision be changed
- Law Reform Commission Report
 - there are problems of fragmentation, lack of clear boundaries and overlap between the federal and states systems